NOTES

Property Disputes Between Husband and Wife in Pennsylvania

Disputes between spouses concerning property can be traced far back in our law. In fact, it probably is a part of one of the oldest branches of known law. Although the problems arising from such disputes are not momentous or world-shaking in nature, they occur every day; they are the ones that the practitioner meets in his daily practice.

In these disputes, the parties are nearly always at arm's length, for it is notorious that where family relations fall out and the matter ends up in a court of law, the quarrel is generally more embittered than that which arises between litigants who are comparative strangers to each other. In such family situations, it is very difficult, if not impossible, to effect a compromise.

At common law, solutions to these problems were obtained with comparative ease because the husband was the master of the household in law and in fact. Hence the rationalization that all property of the family belonged to the husband was not a difficult one to accept. As the years went by, the family situation changed to give the wife more responsibilities and the common law dogma became less tenable. This was recognized by judicial decisions and by sporadic legislative enactments which gave married women more rights. This evolution has produced equitable results in certain fields, but in a few instances the rights of spouses have become confused and distorted. For the law had not completely kept pace with our current social philosophy that husband and wife are generally considered equals.[1]

It is the purpose of this Note to trace the growth of various phases of family property law. Because the area is extensive, the discussion will be restricted to: (1) separation agreements between the spouses; (2) tenancy by the entireties; (3) property rights of the respective spouses; (4) and the effect of divorce on property owned by the spouses.

Separation Agreements Between Spouses

Due to the inferior status attributed to married women at common law, no contract could be made between a husband and wife without the intervention of a trustee. Gradual relaxations were made by courts of equity in this area of law to prevent injustices. Particularly, equity would uphold the contract when it was reasonable and had been executed.[2] Legislative adoption of these holdings and various extensions were reflected in

1. ". . . legislative policy has been unquestionably in the direction of granting women equal rights with men in respect to their property." Haskins, *The Estate By the Marital Right*, 97 U. of Pa. L. Rev. 345, 353 (1949).
2. Hutton v. Hutton's Adm'r, 3 Pa. 100 (1846).

the Act of June 8, 1893,[3] whereby agreements between spouses were taken out of the realm of equity jurisdiction and became enforceable through proceedings at law.[4] By far, the most important of these contracts, and perhaps the ones which caused more litigation, were those entered into between husband and wife covering separation agreements. For when the unity of marriage is threatened, many spouses for the first time focus their attention on their individual property rights and try to devise methods of protecting them.

Valid Separation Agreements.—The law favors family settlements, especially if they are made in good faith and their prime objective is to settle an existing controversy between husband and wife.[5] Agreements for support of one who has withdrawn from the house and family, based upon a good consideration and reasonable in terms, are valid.[6] As long as there is no fraud or overreaching, the separation itself is ample consideration for the agreement which evidences it.[7] Such agreements may be properly entered into to facilitate a disposition of the property between the spouses, or executed in consideration of the withdrawal of a proceeding for desertion or nonsupport.[8]

Further, if there was a valid separation agreement whereby the wife received a lump sum payment and the testimony reveals that the wife knew that was all she would ever get, she will be barred from claiming at the death of her husband any portion of his estate.[9] Likewise, where a wife by such an agreement released her husband "from all duties, liabilities and obligations of every kind whatsoever, which otherwise she might or could claim under or by virtue of the marriage relation," she is not permitted to claim any share of her husband's estate under the intestate laws.[10] But, the wife may recover from the estate where the court finds an intent to provide for her after her husband's death.[11]

In reviewing these arrangements, courts are particularly alert to determine and scrutinize all circumstances surrounding the promulgation of the agreements. If their primary purpose is to contravene some phase of public policy, the judiciary, without hesitation, will declare them invalid.

Invalid Separation Agreements.—If the contract has for its sole purpose the securing of a divorce, the agreement will be held contrary to public

3. PA. STAT. ANN., tit. 48, § 31 *et seq.* (Purdon, 1930); See also PA. STAT. ANN., tit. 48, § 31 *et seq.* (Purdon Supp. 1949).

4. Miller v. Miller, 284 Pa. 414, 131 Atl. 236 (1925).

5. Fishblate v. Fishblate, 238 Pa. 450, 86 Atl. 469 (1913).

6. Singer's Estate, 233 Pa. 55, 81 Atl. 898 (1911); Scott's Estate (No. 2), 147 Pa. 102, 23 Atl. 214 (1892); Hitner's Appeal, 54 Pa. 110 (1867); Hutton v. Hutton's Adm'r, 3 Pa. 100 (1846); Forbes v. Forbes, 159 Pa. Super. 243, 48 A.2d 153 (1946).

7. Huffman v. Huffman, 311 Pa. 123, 166 Atl. 570 (1933).

8. Miller v. Miller, 284 Pa. 414, 131 Atl. 236 (1925).

9. Frank's Appeal, 195 Pa. 26, 45 Atl. 489 (1900).

10. Scott's Estate (No. 2), 147 Pa. 102, 23 Atl. 214 (1892).

11. Huffman v. Huffman, 311 Pa. 123, 166 Atl. 570 (1933).

policy, and therefore, inoperative.[12] The theory behind this is that marriage is not merely a civil contract; it is also an institution sanctioned, encouraged and enforced by the State. Hence, the parties cannot at their mutual whim rescind or dissolve it as they may all other contracts. In this sphere the State, through its duly authorized assembly, has named the reasons for which the marriage can be dissolved. Thus, there can be no decree *pro confesso* upon a libel for divorce; and further, no divorce will be granted where there is "levity or collusion." Therefore, every contract founded upon a consideration which in effect is in contravention of the legal causes for divorce will be held illegal and void.[13]

An arrangement tending to facilitate the granting of a decree is also invalid. An example of this would be a contract between a husband and wife pending proceedings in divorce by which the wife would be paid money, in consideration of her agreement not to oppose the divorce in any manner.[14] However, if the facts negative such an understanding, a settlement for support will be upheld, though a divorce was in the minds of the parties,[15] or the causes upon which the divorce was to be obtained were limited by the agreement.[16] But apparently parol evidence cannot be introduced to show that an agreement, valid on its face, had as its primary purpose the securing of a divorce.[17] This evidences a further inclination by the courts to uphold separation agreements.

Termination of Agreements by Acts of the Parties.—An argeement of separation may be annulled by a reconciliation and a resumption by husband and wife of the marital relation. However, whether such an annulment is effected is dependent upon the intent of the parties, which is determined from their statements, conduct and all the surrounding circumstances.[18] The reconciliation may be made in pursuance of an agreement which ratifies their previous separation agreement, except the stipulation that the parties live apart. Where the parties enter into this new agreement with no fraud, overreaching or unfairness, and one spouse complies with his covenant, equity will compel specific performance by the other spouse of his property obligations incorporated in the agreement.[19]

Tenancy by the Entireties

Except for a few American jurisdictions which by statute or otherwise have abandoned the common law, tenancies or estates by the entireties

12. American National Bank of Camden, Adm'r. v. Kirk, 317 Pa. 551, 177 Atl. 801 (1935).
13. Kilborn v. Field, 78 Pa. 194 (1875).
14. Mathiot's Estate, 243 Pa. 375, 90 Atl. 139 (1914).
15. Forbes v. Forbes, 159 Pa. Super. 243, 48 A.2d 153 (1946); Schofield v. Schofield, 124 Pa. Super. 469, 181 Atl. 572 (1937).
16. Schmoker v. Schmoker, 359 Pa. 272, 59 A.2d 55 (1948) (stipulated in agreement that grounds for divorce alleged would be anything except adultery); Irvin v. Irvin, 169 Pa. 529, 32 Atl. 445 (1895) (agreement that if divorce was sought it would be on ground of desertion).
17. Miller v. Miller, 284 Pa. 414, 131 Atl. 236 (1925).
18. Zlotziver v. Zlotziver, 355 Pa. 299, 49 A.2d 779 (1946).
19. Singer's Estate, 233 Pa. 55, 81 Atl. 898 (1911).

are universally recognized as a traditional method by which married persons can hold property.[20] There are five unities requisite for this type of estate—those of interest, title, time, possession and the unity of the husband and wife as a person at law. The basis of the estate is the common law conception of the indivisibility of husband and wife under the marital relationship. As Bracton said, "Man and wife are as one person, for they are one in flesh and blood." [21]

Conveyances to Husband and Wife.—At common law a conveyance to husband and wife was presumed to create an estate by the entireties.[22] Cases decided since the passage of the Married Women's Property Acts, which substantially recognized the wife to be the husband's equal by allowing a wife to hold property separate from her husband, have held that a conveyance to husband and wife granting distinct undivided interests or individual estates to each, will not be construed to create an estate by the entireties as against the express intent of the parties that they shall take otherwise.[23] Hence, a husband and wife may take and hold property as tenants in common, *i.e.,* as individuals and not as a common law entity, if that be the actual intent. But if the deed to husband and wife discloses no such intention, they will still take as tenants by the entireties.[24]

Transfer between spouses of real property.—At common law a wife, who was the sole owner of real property could not convey it to her husband and herself so as to create a tenancy by the entirety without the intervention of a trustee. The reason for this was that a grant or transfer of an interest in land had to be between separate and distinct grantors and grantees.[25] Judicial interpretation of The Uniform Interparty Agreement Act, enacted in 1927,[26] changed the common law rule, and allowed a married woman to convey her real estate directly to her husband and herself in the same manner that she can convey it to any other person to hold jointly with her.[27] Later the Act was amended so as to incorporate the judicial holding.[28]

20. For a discussion of estates by the entireties see Fairchild v. Chastelleux, 1 Pa. 176 (1845); Johnson v. Hart, 6 W. & S. 319 (Pa. 1843). See also Doe v. Parratt, [1794] 5 T.R. 652, 654, 101 Eng. Rep. 363; Back v. Andrews, [1689] 2 Eq. Cas. Abr. 230, 2 Vern. 120, 24 Eng. Rep. 1; 2 KENT COMM. *132; 2 BL. COMM. *182.

21. Co. LITT. *291. As to this statement, Professor Haskins has said such an explanation is deceptive and historically incorrect. Haskins, *The Estate By The Marital Right,* 97 U. OF PA. L. REV. 345, 346 (1949).

22. *See* Bramberry's Estate, 156 Pa. 628, 632, 27 Atl. 405, 408 (1893).

23. Blease v. Anderson, 241 Pa. 198, 88 Atl. 365 (1913); Young's Estate, 166 Pa. 645, 31 Atl. 373 (1895).

24. Klenke's Estate (No. 1), 210 Pa. 572, 6 Atl. 166 (1905) (personalty); *In re* Estate of Mary R. Vandergrift, 105 Pa. Super. 293, 161 Atl. 898 (1932) (realty).

25. *In re* Estate of Mary R. Vandergrift, 105 Pa. Super. 293, 161 Atl. 898 (1932).

26. PA. STAT. ANN., tit. 69, § 541 (Purdon, 1931).

27. *In re* Estate of Mary R. Vandergrift, 105 Pa. Super. 293, 161 Atl. 898 (1932).

28. PA. STAT. ANN., tit. 69, § 541 (Purdon Supp. 1949). See also PA. STAT. ANN., tit. 48, § 71 (Purdon Supp. 1949) (reaches same result).

Interests of spouses in real property held by the entirety.—Before the passage of the various statutes relating to the property of a married woman, a husband who held with his wife an estate by the entirety had substantial control over it and its income. He was entitled to all of the rents and profits derived therefrom. Further, he could sell it and the purchaser would receive an estate for the life of the husband and an absolute estate in remainder, if the husband survived his wife. If waste was committed, the husband could sue in his own name and for his sole benefit, even though the injury would result in a detriment to the wife's interest, if she survived her spouse.[29] It should be noted that these rights were not an incident of the estate but of the husband's marital rights and applied to the property of the wife, regardless of the type of her estate in it.[30] Though the Married Women's Property Acts effectively abolished these marital rights, they did not affect the existence of the estate by the entireties.[31] Today, neither husband nor wife can sell any interest, including the expectancy of survivorship, without the joinder of other. Further, the husband no longer has sole interest in the rents and profits, and the wife is an equal partner with her husband in this type of estate.[32]

Personal Property and Choses in Action of the Spouses.—Personal property may be held by husband and wife by the entireties,[33] as well as choses in action which are in possession.[34] Where a bank deposit is payable to "husband *and* wife"—a deposit by the entireties—the money can not be withdrawn except upon checks or orders signed by both spouses, and the bank could pay differently only at its peril.[35] But there is nothing in the law relating to entireties that would prevent one spouse from giving the other spouse express authority to sign for her or him as agent and withdraw for both of them, although no such authority may be implied.[36] Consequently, when an account is made payable at its creation to "husband *or* wife," there is an immediate expression of authority for either one to act for both.[37]

29. *See* O'Malley v. O'Malley, 272 Pa. 528, 532, 116 Atl. 500, 502 (1922).
30. Fairchild v. Chastelleux, 1 Pa. 176 (1845).
31. Meyer's Estate (No. 1), 232 Pa. 89, 81 Atl. 145 (1911).
32. Gasner v. Pierce, 286 Pa. 529, 134 Atl. 494 (1926); O'Malley v. O'Malley, 272 Pa. 528, 116 Atl. 500 (1922).
33. *E.g.*, Wilbur Trust Co. v. Knadler, 322 Pa. 17, 185 A.2d 319 (1936) (mortgage trust certificates); Sloan's Estate, 254 Pa. 346, 98 Atl. 966 (1916) (joint bank account); Parry's Estate, 188 Pa. 33, 41 Atl. 448 (1898) (letters of credit purchased by the husband in the name of himself and his wife); Gillan's Executors v. Dixon, 65 Pa. 395 (1870) (personal estate of a deceased daughter passing to her parents); Magee v. Morton Building & Loan Assn., 103 Pa. Super. 331, 158 Atl. 647 (1932) (building and loan stock).
34. Klenke's Estate (No. 1), 210 Pa. 572, 6 Atl. 166 (1905); Bramberry's Estate, 156 Pa. 628, 27 Atl. 405 (1893).
35. Milano v. Fayette Title & Trust Co., 96 Pa. Super. 310 (1929).
36. Madden v. Gosztonyi Savings & Trust Co., 331 Pa. 476, 200 Atl. 624 (1938).
37. *E.g.*, Madden v. Gosztonyi Savings & Trust Co., *supra* note 36. In Gasner v. Pierce, 286 Pa. 529, 134 Atl. 494 (1926) the premises were held by the entireties. Lessee signed a lease of said premises, but only lessor husband signed. The court held the wife could collect the rent and once this was done the husband could not claim the same rent from the lessee; O'Malley v. O'Malley, 272 Pa. 528, 116 Atl. 500 (1922) (to same effect).

Accounting Between Spouses re Property Held by the Entireties.—At common law a wife could not maintain an action against her husband to enforce a property right; the legal unity of marriage prevented such action.[38] The Act of June 8, 1893, as amended, provides *inter alia:* that a married women "may not sue her husband, except in a proceeding for divorce, or in a proceeding to protect and recover her *separate* property; nor may he sue her, except in a proceeding for divorce, or in a proceeding to protect or recover his *separate* property."[39] (Italics supplied.) In an estate by the entireties the property belongs to both and is not considered the *separate* property of either the husband or the wife individually—the title is said to be *per tout et non per my.*[40] The problem then raised is—suppose one spouse takes the entire profits from the property held by entireties what may the spouse deprived of the profits do?

It was early held in *Meyer's Estate,*[41] that since there was no separate property of either spouse, neither party could maintain an action against the other for an accounting of funds derived from property so held. In fact, neither of the spouses could restrain the other against consuming more than an equal part.

This broad prohibition was relaxed somewhat in the case of *O'Malley v. O'Malley,*[42] which involved an accounting between the parties after they were divorced. In Pennsylvania a divorce at that time did not terminate the estate by the entireties,[43] but nevertheless, an accounting was allowed in this situation.[44] The court approved the *Meyer's* doctrine but stated that it only applied to the particular facts of that case, *i.e.,* when a trustee in bankruptcy of the husband claims one-half of property held by the entireties, and the parties are married and living together.

Further inroads into the general rule that a spouse may not maintain an action for an accounting of property held by the entireties were made by the court in the case of *Berhalter v. Berhalter.*[45] There an accounting was allowed when a wife withdrew all funds held by the entireties and threatened to leave her husband. The court stated that a tenancy by the entirety could be terminated by agreement between the parties. Here, although either spouse had the right to withdraw the funds from the bank, the wife's withdrawal under these circumstances amounted to an offer to terminate the estate. The husband's suit for an accounting constituted the necessary acceptance. Then the estate no longer existed and the husband could sue for his separate property. It was noted that where such a joint power of withdrawal exists, it must be exercised in good faith for

38. *See* Heckman v. Heckman, 215 Pa. 203, 205, 64 Atl. 425, 426 (1906).
39. PA. STAT. ANN., tit. 48, § 111 (Purdon, 1930).
40. Frederick, Adm'r v. Southwick, 165 Pa. Super. 78, 67 A.2d 802 (1949).
41. 232 Pa. 89, 81 Atl. 145 (1911).
42. 272 Pa. 528, 116 Atl. 500 (1922).
43. See text *infra* at note 143.
44. *But cf.* Milano v. Fayette Title and Trust Co., 96 Pa. Super. 310 (1929), the court there distinguished the O'Malley case from the Meyer's case in that O'Malley involved only income and there can be an accounting for that, but in the Meyer's case it was corpus and there can be no accounting in that situation.
45. 315 Pa. 225, 173 Atl. 172 (1934).

the mutual benefit of both spouses; here one spouse converted against the other's will and without the other's consent, thereby expressly or by implication denying the other's estate in the property.

This view was further explained in the case of *Werle v. Werle*.[46] There all funds in a checking account made payable to either husband or wife were supplied by the husband. Subsequently, he withdrew the funds, alleging an oral understanding that, despite the form of the accounts, the funds were to remain his. This contention was discredited, and the account was held to be a tenancy by the entirety. Consequently, the husband's withdrawal under the claim of full ownership amounted to a fictitional offer to sever the estate and the wife's request for an accounting was a sufficient acceptance.

Then came the decision of *Wakefield v. Wakefield*,[47] where a wife sought an accounting from her husband of rents which accrued after separation from real estate held by the entirety. There was no allegation of an intent to defraud, or that the husband was using the funds for his own selfish use. Thus, the reasons for allowing an accounting in the *Berhalter* and *Werle* cases did not exist. No offer to destroy the estate and divide the property could be inferred from the alleged conduct of the husband; the property was still held by the entireties and therefore no accounting could be obtained.[48]

After the appellate courts had developed this reasonable test for determining when to allow one spouse to obtain an accounting for property held by the entirety, a lower court apparently relaxed somewhat the distinctions developed.[49] It granted a wife one-half of the funds that were in a joint bank account before her husband transferred the entire funds to his sole account. Apparently the only evidence of the husband's fraudulent intent was his prior refusal to comply with the wife's demands for one-half of the funds. Nevertheless, the court considered his acts sufficient to constitute bad faith. Therefore, the wife's demands were justified.[50]

In a recent case, where the only evidence before the Superior Court was that one spouse had taken all funds held by the entirety, the court refused to allow an accounting.[51] It reiterated the accepted dogma that either spouse may withdraw the funds in such a bank account, where the right has been reserved, but the power must be exercised in good faith for the mutual benefit of both.

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46. 332 Pa. 49, 1 A.2d 244 (1938).
47. 149 Pa. Super. 9, 25 A.2d 841 (1942).
48. It is interesting to note that in Weiner v. Weiner, 68 D. & C. 51 (Pa. C.P. 1949), the court asserted that the Supreme Court (Berhalter Case) is following a liberal trend in allowing during the continuation of the marriage an accounting of property held by the spouses as tenants by the entireties, while the Superior Court (Wakefield case) is adhering to the original strict theory in refusing an accounting between tenants by the entireties while the marriage subsists. This distinction appears fallacious because the court did not give proper weight to the distinguishing facts in the cases.
49. Gontek v. Gontek, 58 D. & C. 419 (Pa. C.P. 1947).
50. See Werle v. Werle, 332 Pa. 49, 1 A.2d 244 (1938).
51. Kaufman v. Kaufman, 166 Pa. Super. 6, 70 A.2d 481 (1950).

The above rule appears to be followed by the various county courts.[52] However, at times they are urged to overthrow the doctrine and require spouses to obtain an absolute divorce before either may bring a suit for an accounting. To support this view, its proponents point to the present statutes which provide that non-divorced spouses may only sue each other for their separate property. Since property held by the entireties does not fall within this classification, they contend that the current judicial holdings are beyond the statute. They further urge that there is no legitimate reason to allow the relationship of marriage to continue, while at the same time decreeing the parties to be in the position of defrauder and victim. Thus, their position is that the statutes, contract of marriage, and unities of the estate should make the parties immune to litigation concerning petty differences over property held by the entirety; and if the differences are not petty, the marriage should be dissolved.[53]

Justification for the above view appears extremely tenuous when cognizance is taken of the situation existing in many households today. Numerous factors often deter spouses from seeking a divorce, although the marital relationship may exist in name only. This unhealthy situation often results from a desire by the spouses to shield their children from the social disgrace accompanying divorce. Also, religious beliefs or other deeply imbedded feelings may deter them from obtaining a legal termination of their marriage. It is under these conditions that extreme injustice and hardship could result if one spouse is precluded from maintaining a legal action to prevent the other from completely usurping property held by the entirety. Obviously, the situation is pathological and represents a lag in our legislative enactments. Courts have struggled with difficult statutory language and deeply rooted tradition to reach equitable results; immediate assistance from the legislature should be forthcoming.

Rights of Creditors re Property Held by the Entireties.—If property is lawfully held by the husband and wife as tenants by the entireties it can not be reached by the creditors of either of the spouses.[54] This is on the theory that the property is owned by the unity of husband and wife and not by either individually. Therefore, neither has an interest which his or her creditors can reach. However, the expectant interest of either the husband or the wife can be the subject of a lien. But if the interest is sold by the joint parties, the lien can not be enforced against it. For the lien to be enforceable it must be against the surviving spouse, because it is only

52. *E.g.*, Scardino v. Scardino, 69 D. & C. 635 (Pa. C. P. 1949) in which husband told lawyer, who received interest on a mortgage owned by the husband and wife as tenants by the entireties, not to pay over any portion thereof to the wife. The court held there could be no accounting, since this did not constitute an offer on the part of the husband to destroy the estate, which the wife may accept, but on the contrary tends to preserve the fund in its entirety, by refusing to allow it to be divided. Lalich v. Lalich, 60 D. & C. 337 (Pa. C. P. 1947) (where husband filed bill for accounting for one half of profits of a lunchroom owned by spouses as tenants by the entireties, court held no accounting on basis of *Wakefield* case).

53. Weiner v. Weiner, 68 D. & C. 51 (Pa. C.P. 1949).

54. Iscovitz v. Filderman, 334 Pa. 585, 6 A.2d 270 (1939).

at that time that the spouse becomes the sole and indefeasible owner of the legal title.[55]

Persons Not Legally Husband and Wife.—An estate in entirety may be acquired only by a man and women who acquire the legal relation of husband and wife at the time the conveyance or devise to them became effective.[56] Parties not being husband and wife can not take title as tenants by the entireties for such seisin *per tout et non per my* is restricted to grantees who are legally husband and wife.[57] Thus, there is no tenancy by the entireties where an estate is conveyed to a man and woman who are unmarried in law, and who afterwards marry; as they took originally by moieties, they continue to hold by the moieties after marriage.[58] The fact, however, that the deed was ineffective in creating a tenancy by the entireties, does not in itself invalidate it, the grantees have still been allowed to take an estate, either as joint tenants or tenants in common.[59] What particular estate the grantees take depends upon the form of dual ownership that would be "appropriate under the circumstances." [60] To determine the "appropriate" form of joint ownership, the court will consider—"Did the parties manifest an *intention* to create an estate to be owned completely by the surviving grantee?" [61]

Thus in situations where the parties enter into a bigamous marriage (normally because one of the parties believes his previous spouse to be dead) and have property deeded or devised to them, "their heirs and assigns as tenants by the entireties," their declared intention is considered to be to own an estate *per tout et non per my.* This was the reasoning of *Maxwell v. Saylor* [62] which held that the instrument stated in so many words that the spouses desired to establish a right of survivorship. The court explained that under such circumstances a joint tenancy with the right of survivorship, an estate *per my et per tout,* best effectuates the declared intention to the extent legally allowed. This form of joint ownership for unmarried persons most closely approximates a tenancy by the entireties enjoyed by lawfully married parties, since in both situations the survivor takes the whole.

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55. Klopenstein v. Chadbourne, 105 Pa. Super. 530, 161 Atl. 624 (1932).

56. Barrows v. Romaine, 17 D. & C. 457 (Pa. C.P. 1931).

57. Frederick, Adm'r. v. Southwick, 165 Pa. Super. 78, 67 A.2d 802 (1949); Thornton v. Pierce, 328 Pa. 11, 194 Atl. 897 (1937).

58. Stuckey v. Keefe's Executor's, 26 Pa. 397, 403 (1856).

59. Thornton v. Pierce, 328 Pa. 11, 194 Atl. 897 (1937) cites no Pennsylvania authority for this proposition, although cases in other jurisdictions are cited; Debnam v. Debnam, 63 D. & C. 700 (Pa. C.P. 1948).

60. Maxwell v. Saylor, 359 Pa. 94, 58 A.2d 355 (1948); *See* Teacher v. Kijurina, 76 A.2d 197, 201 (Pa. 1950).

61. Frederick, Adm'r. v. Southwick, 165 Pa. Super. 78, 67 A.2d 802 (1949).

62. 359 Pa. 94, 58 A.2d 355 (1948). The dissent was vigorous in saying there could be no joint tenancy, but what resulted was tenancy in common. This is the most that parties not legally husband and wife take when they try to create a tenancy by the entirety. The minority claim there is no support for the position taken by the majority.

This rule was modified to some extent by the recent case of *Teacher v. Kijurina.*[63] There the named grantees lived together but were not in fact married. It was held a tenancy in common without the right of survivorship was created when land was conveyed to them as "Nick Kijurina and Sarah his wife." The court said, "In *Maxwell v. Saylor* we went as far as we could go and that case must not be extended beyond its facts."

However, even where the court claims it is carrying out the intention of the parties, there is a technical difference between the estate the parties tried to take and the estate they were given by the court.[64] The distinction is that the *jus accrescendi,* right of survivorship, as an incident of joint tenancy at common law gives the survivor a new estate by the addition of a moiety to his prior interest;[65] whereas, the interest of the surviving spouse in an entireties estate is in theory not altered. Death of one tenant merely reduces the legal personage holding the estate to an individuality identical with the natural person.

At first blush the court in giving persons who tried to take an estate by the entireties, and who were incapable of taking such an estate, a joint tenancy appears to give them nothing. This is based on the Act of March 31, 1812,[66] which abolished the right of survivorship as an incident of joint tenancies. But the statute has been interpreted so as not to prevent the creation of the right of survivorship arising by the express words of a will or deed or by necessary implication, and cases have held that no particular form of words need be articulated to manifest such an intention.[67]

Voluntary Destruction of an Estate by the Entireties.—An estate by the entireties may be ended by voluntary partition, even during the continuance of the marriage relationship. This is normally accomplished by having one of the spouses convey his or her interest in real estate held by the entireties to the other who accepts it, pays the consideration and records the deed.[68]

Property Rights of the Respective Spouses

Generally, the fact that a particular chair was always called "father's chair" does not of itself establish the proposition that he is the true owner for all purposes. Even "mother's silver" may turn out to be the property of her husband. As between a wife and her husband possession or use

63. 76 A.2d 197 (Pa. 1950).

64. One of the most important differences is that a creditor of one of the parties can enforce his lien on that party's moiety. Other differences exist, *e.g.,* taxation.

65. Frederick, Adm'r. v. Southwick, 165 Pa. Super. 78, 67 A.2d 802 (1949).

66. Pa. Stat. Ann., tit. 20, § 121 (Purdon, 1950).

67. Mardis v. Steen, 293 Pa. 13, 141 Atl. 629 (1928); Arnold v. Jack's Executor's, 24 Pa. 57 (1854); Montgomery v. Keystone Savings & Loan Ass'n., 150 Pa. Super. 577, 29 A.2d 203 (1943); *see* Teacher v. Kijurina, 76 A.2d 197, 201 (Pa. 1950).

68. Runco v. Ostroski, 361 Pa. 593, 65 A.2d 399 (1949); Kauffman v. Stenger, 151 Pa. Super. 313, 30 A.2d 239 (1943).

of personal property is no indicia of title. Nor can any satisfactory conclusion be drawn from the mere fact that a particular article was bought and paid for by one of the spouses. Even though a wife may allow her husband during his lifetime to sell her personal property and deposit the proceeds in his own account, it does not necessarily follow that such a practice would continue indefinitely or that the personal property in question should be considered as belonging to the husband's estate in case of death.[69] In the normal happy home the family financial arrangements are in such a state of inextricable confusion that no one can say with any degree of certainty who has paid for anything.

Property Belonging to the Husband Before Marriage.—Apart from the wife's inchoate right of dower, common law gave the wife no immediate interest in the husband's property. The husband was the legal unit. Modern legislation which gave to the wife certain rights did not necessitate any general reclassification of the husband's capacity as to his property. The husband remains, after marriage as before, the master of his own assets, except that he cannot bar the wife's dower or statutory share.[70]

Property Belonging to the Wife Before Marriage.—Marriage at common law was a very costly undertaking for a woman with property, for upon marriage the husband automatically became entitled to the usufruct of her real property as long as coverture lasted.[71] Further the husband could, if he so desired, alienate his interest in the property so held, and it was subject to execution for his debts.[72] The husband took absolute title to her personal property[73] except for her paraphernalia;[74] he received the power to dispose of his wife's choses in action to himself or to a third party. However, if such power was not exercised he lost all rights therein.[75] The husband was also entitled to the use and income of all his wife's chattels real, with the power of disposition during coverture, and those which were undisposed of became his property absolutely, if he survived his spouse.[76] These generous gifts to the husband of property owned at the time of the marriage by his wife, resulted from the theoretical termination of the separate legal existence of the wife by virtue of the marriage in which her rights, capacity and will was from then on represented by the husband.[77]

69. Hoar v. Axe, 22 Pa. 381 (1853); Heltzel's Estate, 52 D. & C. 337 (Pa. O.C. 1945).

70. VERNIER, AMERICAN FAMILY LAWS § 176 (1935).

71. 1 BL. COMM. *445; For an interesting discussion of the tenancy by the marital right see Haskins, *The Estate By The Marital Right,* 97 U. OF PA. L. REV. 345 (1949).

72. 2 KENT, COMM. *131; Haskins, *op. cit. supra* note 71.

73. 1 BL. COMM. *445; see VERNIER, *op. cit. supra* note 70 at § 167.

74. See text *infra* at note 101.

75. Gochenaur's Estate, 23 Pa. 460 (1854); Torbert v. Twining, 1 Yeates 432 (Pa. 1795).

76. GLANVILLE, DE LEGIBUS, VI, 3, BRACTON, DE LEGIBUS, fol. 429b.

77. Howard v. Menifer, 5 Ark. 668, 671 (1843).

The impact of these harsh common law rules apparently was eased to some extent in the case of *Rogers v. Fales.*[78] Although the case dealt specifically with property acquired by a wife after marriage, the rationale of the court indicated that upon marriage the spouses could agree that the wife would retain her property. If such intent were clearly established, the agreement would be enforceable.

Subsequently, the Married Women's Property Act of 1848[79] emancipated married women from the fetters imposed by the common law. By virtue of the Act, marriage no longer automatically confers a gift on a husband of either his wife's chattels in possession, her power over choses in action, or her real or personal property.[80] On the contrary the property of a married woman belongs to her as if she were single and she cannot be deprived of it by her husband without her consent. If necessary, the wife may sue for it in her own name.[81]

However, a married woman's claim that she owned certain property before marriage must be proved by evidence which does not admit of a reasonable doubt.[82] Further, the courts, apparently because of the confidential relationship of the husband and wife, will scrutinize more carefully any transaction in which it is a question of the wife prevailing over the creditors of the husband. For past experience justifies a fear by our judicial authorities of fraud and collusion between spouses.

Property Acquired by the Husband After Marriage.—As indicated previously, at common law, by virtue of the marriage a husband acquired substantial interests in all of his wife's property. But by the Married Women's Property Act of 1848, this operation of law was negatived, and the wife retained her pre-marital property rights.

Property given to a husband after marriage, or purchased by him with his funds, is and remains his own.[83] Serious questions, however, arise when transfers are made from a wife to her spouse or when she allows her husband to obtain her funds directly. Where no valid con-

78. 5 Pa. 154 (1847). This case was overruled on procedure by Good v. Mylin, 8 Pa. 51, 55 (1848) but substantive law was still followed in Goodyear v. Rumbaugh, 13 Pa. 480, 481 (1850).

79. PA. STAT. ANN., tit. 48, § 64 (Purdon 1930): "Every species and description of property, whether consisting of real, personal or mixed, which may be owned by or belong to any single woman, shall continue to be the property of such woman, as fully after marriage as before; and all such property—which shall accrue to any married woman during coverture—shall be owned, used and enjoyed by such married woman as her own separate property . . ."

80. Musser v. Gardner, 66 Pa. 242 (1870) Martin v. Davis, 30 Pa. Super. 54 (1906); Heltzel's Estate, 52 D. & C. 337 (Pa. O.C. 1945).

81. Gicker's Adm'rs. v. Martin, 50 Pa. 138 (1865); Goodyear v. Rumbaugh, 13 Pa. 480 (1850); Remaley v. Remaley, 37 Luzerne L. Reg. Rep. 411 (Pa. C.P. 1944) (gifts to wife prior to marriage remain her property upon marriage).

82. Gamber v. Gamber, 18 Pa. 363 (1852) in which husband and wife ordered a carriage from *X*. Later husband died and wife claimed carriage as belonging to her, on the ground that she had given her husband the money to pay for it. The court found that it was not the wife's money. A factor which might have influenced the court to so hold was that the husband died insolvent.

83. Remaley v. Remaley, 37 Luzerne L. Reg. Rep. 411 (Pa. C.P. 1944).

sideration supports the transfer, there is a presumption, that it creates a trust for the wife rather than a gift to her husband.[84]

(a) Possession by husband of wife's funds and personal property.—The mere possession of a wife's money by a husband is in itself no evidence, since the Act of 1848, that title to it is vested absolutely in him.[85] The presumption of a trust arises from a piercing by the courts of the veil of marriage, which in the ordinary situation shows the wife's subordination and fidelity to the husband and the necessity for protecting her against abuse of the relationship by the husband.[86] Even in the situation where a wife wants to give personal property which she owns outright to her husband, the burden is upon the husband to establish a gift,[87] and if the husband's heirs or his creditors claim that money received by the husband from his spouse is a gift, the burden is upon those who make such an allegation to maintain it by proof.[88]

Yet, in a situation where creditors rights are involved, the court sometimes use some sort of estoppel to protect them over the rights of the wife. For example, in *Nolen's Appeal,*[89] the wife received from the estate of her father $1617.68, which she gave to her husband to deposit in a bank for her use. The husband, however, deposited it in his bank to his own credit, and used it. The wife tried to recover the sum from her husband's insolvent estate. The court did not apply the presumption of a trust, but on the contrary, said that in converting the money to his own use, the husband was in the exercise of a legal right, which could not be question at the expense of his creditors. This again is a situation where the court fears some type of fraud resulting from the intimate relationship of husband and wife.

Neither will the presumption of a trust in favor of the wife apply if the wife directs her husband to dispose of or expend her own separate estate, in a particular manner, for her benefit and comfort. When this is done the courts hold that the wife is bound by her own acts and she can not obtain a return of the money or property.[90] The same doctrine will apply, as long as the husband uses his wife's property with her knowledge, consent and approval.[91] In *Gleghorne v. Gleghorne,*[92] a bill in equity was filed by a wife against her spouse in order to recover a sum of money which had been expended by her to aid in the construction of a dwelling for their home upon real estate purchased by the husband. It was held that when a wife's money is received by the husband and appropriated by

84. Hamill's Appeal, 88 Pa. 363 (1879).
85. Hamill's Appeal, *supra* note 84; Estate of Bardsley, 13 Phila. 222 (Pa. 1879).
86. *See* Werle v. Werle, 332 Pa. 49, 1 A.2d 244 (1938).
87. Estate of Bardsley, 13 Phila. 222 (Pa. 1879).
88. Estate of Wormley, 137 Pa. 101, 20 Atl. 621 (1890).
89. 23 Pa. 37 (1854).
90. Johnston v. Johnston's Adm'r., 31 Pa. 450 (1858).
91. Kreider's Estate, 212 Pa. 587, 61 Atl. 1115 (1905).
92. 118 Pa. 383, 11 Atl. 797 (1888).

him at her request towards the building of a dwelling house for a common home, without circumstances indicating the relation of debtor and creditor, the wife may not reclaim the money by a subsequent proceeding against the husband. A comparable question may arise where a husband has no earnings or private income and receives an allowance from his wife with which he buys various chattels. Do they belong to him? This appears to be a question of fact, and there is a good chance of it being decided in favor of the husband. As previously indicated, there is authority for the proposition that the presumption of a trust, which arises in favor of the wife will not be rigidly adhered to and courts in certain situations will imply a valid gift to the husband,[93] or if the husband rebuts the presumption of a trust, the court will hold that it was a gift.[94] Under such conditions, a husband has complete control over the purchases.

(b) Transfer of real property from wife to husband.—Legislation has virtually eliminated many of the problems which formerly arose in the transfer of real property from a wife to her husband. At common law, a wife was powerless to convey her lands directly to her spouse for as Blackstone noted, she was not considered to have a separate existence.[95] However, an indirect conveyance between the spouses through the medium of a third party was valid.[96]

Even after the Married Women's Property Act of 1848 a wife could not convey her real estate to her husband, unless it affirmatively appeared from all the surrounding circumstances that it was by her own volition and was not induced by his undue influence.[97] Strict judicial interpretation placed on these requisites by the courts virtually cut off all conveyances of realty by a wife to her spouse. In fact, in a later decision the court said that a deed from a wife to her spouse was absolutely void and of no more than a blank piece of paper because of the inability of the grantor to divest her title, and also because of the incompetency of the grantee to take.[98] This feudal rule which should have been rendered a nullity by the Act of 1848 was changed specifically by the Act of June 3, 1911,[99] which allows a wife to make a direct conveyance to her husband. Spouses were thereby

93. *E.g.,* Kreider's Estate, 212 Pa. 587, 61 Atl. 1115 (1905); Gleghorne v. Gleghorne, 118 Pa. 383, 11 Atl. 797 (1888); Johnston v. Johnston's Adm'r., 31 Pa. 450 (1858); Nolen's Appeal, 23 Pa. 37 (1854).

94. Estate of Bardsley, 13 Phila. 222 (Pa. 1879) (indicates presumption of trust in favor of wife in this situation is rebutable).

95. 1 BL. COMM. *442.

96. VERNIER, *op. cit. supra* note 70, § 182.

97. Darlington's Appeal, 86 Pa. 512 (1878).

98. Elder v. Elder, 256 Pa. 139, 100 Atl. 581 (1917).

99. PA. STAT. ANN., tit. 48, § 71 (Purdon 1930): "It shall be lawful for a married woman to make conveyances of real estate to her husband as if she were a feme sole." This was amended by the Act of May 31, 1947, P.L. 352, No. 160 § 1 which allowed a wife to convey to her husband and herself jointly, PA. STAT. ANN., tit. 48, § 71 (Purdon Supp. 1949). See also PA. STAT. ANN., tit. 69, § 541 (Purdon Supp. 1949) for another statute reaching the same result as this amendment.

placed in the same position as strangers with regard to the transfer of real property.[100]

Property Acquired by the Wife After Marriage.—As indicated previously, at common law all of the wife's property upon marriage became for practical purposes the husband's property. Certain reversionary interests were retained by her, however, and thus upon her husband's death, she regained full rights in her real property and title to her undisposed of paraphernalia.[101] But the latter property remained subject to claims of her spouse's creditors.[102] Today, these ancient doctrines are of little practical significance, for as a result of legislative enactments, the property which a wife brings to the marriage, or which she afterwards acquires with her own means or from third persons, remains her own.[103] Proof of her ownership must be made by evidence which does not admit of a reasonable doubt. In the case of a purchase after marriage, clear proof must be submitted that the funds used were not supplied by her husband.[104]

(a) Property Held by Husband as Trustee for Wife.—In order to protect the wife's property interest when her husband has control and ownership of her property, courts have frequently invoked "constructive trust" or "agency" doctrines. Instances of this procedure have already been given. A further example is reflected in the case of *Bancord v. Kuhn*.[105] There, although a father deeded land to his daughter and her husband, the court found that the grantor's intent was for his daughter to have sole interest in the property. Hence the husband merely held the property as trustee for his wife, and it was not subject to claims of his creditors.

(b) Transfers by Husband to Wife.—Transfers of possession of property from husbands to their wives have frequently caused much confusion and litigation. If they were reasonable and not in fraud of creditors, equity, even before the Married Women's Property Act of 1848, frequently sustained the gift, even though there was no intervention of a trustee.[106]

100. Elder v. Elder, 256 Pa. 139, 100 Atl. 581 (1917) indicates that this will be the result of the Act of June 3, 1911.

101. A wife's wearing apparel, articles of luxury and personal ornaments suitable to her rank and degree. Sawyer v. Sawyer, 28 Vt. 249, 251 (1856); Howard v. Menifee, 5 Ark. 668, 671 (1843); Graham v. Londonderry, [1746] 3 Atk. 393, 26 Eng. Rep. 1026; 2 BL. COMM. *435; VERNIER, AMERICAN FAMILY LAWS § 170 (1935).

102. Howard v. Menifee, *supra* note 101; Lord Hastings v. Douglas, [1633] Cro. Car. 343, 79 Eng. Rep. 901.

103. VERNIER, *op. cit. supra* note 70, § 167.

104. *E.g.*, Jack v. Kintz, 177 Pa. 571, 35 Atl. 867 (1896); Bower's Appeal, 68 Pa. 126 (1871); Baringer v. Stiver, 49 Pa. 129, 13 Wright 129 (1865); Gamber v. Gamber, 18 Pa. 363 (1852).

105. 36 Pa. 383 (1860).

106. Herr's Appeal, 5 W. & S. 494 (Pa. 1843) (before Married Women's Property Act of 1848); William's Appeal. Moore's Estate, 47 Pa. 307 (1864) (after married Women's Property Act of 1848). As to rights of creditors see Townsend v. Maynard, 45 Pa. 198 (1864); Chadwick Estate, 154 Pa. Super. 157, 35 A.2d 582 (1943).

Originally, such a gift had to be established by clear and convincing proof, not only of the act of donation and delivery, but of the wife's separate custody.[107] Later a husband was allowed to make a valid gift to his spouse although she, in fact, knew absolutely nothing of the transaction at the time, and did not then accept it. The wife's acceptance could be presumed.[108] But the courts indicate, that it is for the jury to determine if there was a bona fide gift to the wife or whether the arrangement was simply a fictitious one under which it was understood by the parties that the real ownership was still to be in the husband. The court will set aside any transfer between spouses that is a sham.

If a husband buys real estate and has the deed made to his wife (no interests of creditors involved) the legal presumption is that a gift was intended. If the husband, in such a situation, subsequently claims a trust in his favor, he must, in order to rebut the presumption, prove by clear, explicit and unequivocal evidence, not only the fact of payment of the purchase money by him, but all the essential requisites of the alleged trust.[109]

Where a husband permits some of his own money and his wife's earnings to be deposited in a bank in his wife's name, and never afterwards claims the money, and the wife subsequently makes additional deposits, the presumption is that the husband intended the original deposit as a gift to her.[110] Also money on deposit in the name of the wife is prima facie her money, and where the husband claims it at her death the burden is on him to prove that it is his property.[111] Today there is a general presumption existing in all dealings between husband and wife that all real or personal property bought in the name of the wife with the funds of the husband or transferred from the husband to the wife without consideration is a gift to her.[112]

In the ordinary household the wife constantly has the spending money provided by her husband either specially or by way of allowance. To whom do chattels bought by her out of this money belong? It is obvious that if he gives her a dress allowance the clothes she buys are her own.[113] But it is not every domestic allowance that involves a personal gift. It was early decided in regard to the savings by the wife, during coverture out of the "house money" which was entrusted to her, that she receives and

107. William's Appeal. Herr's Appeal, 5 W. & S. 494 (Pa. 1843); Moore's Estate, 47 Pa. 307 (1864).

108. Sparks v. Hurley, 208 Pa. 166, 57 Atl. 364 (1904) (where husband transfers an account with a firm of stockbrokers from his own name to that of his wife, and the brokers made the transfer on their books, the wife may subsequently maintain an action against the brokers for trover, if they sell the securities in that account for a debt of the husband, without notice to her, or to her husband as her agent in managing the account).

109. Earnest's Appeal, 106 Pa. 310 (1884).

110. Klenke's Estate (No. 1), 210 Pa. 572, 60 Atl. 166 (1905).

111. Crosetti's Estate, 211 Pa. 490, 60 Atl. 1081 (1905).

112. See Werle v. Werle, 332 Pa. 49, 51, 1 A.2d 244 (1938).

113. McDevitt v. Vial, 7 Sadler 585, 11 Atl. 645 (Pa. 1887) (money or property which is donated to a wife for her own use, and for the use of her family, is her separate property).

spends that money for the common benefit of the family, as the agent for her husband, and the articles she purchases with it are and remain the husband's property. The possession of such funds by a wife ordinarily implies no more than that she is holding them for safekeeping for her husband.[114] In *Raybold v. Raybold,*[115] the court held that meritorious as the wife's industry and frugality was, the savings by her during coverture enured to the benefit of her husband. Therefore, if real estate was purchased with funds thus acquired, any trust that may result by operation of law would be for the benefit of the husband and not to the wife. The court also pointed out that while the Married Women's Property Act of 1948 had done much to change the legal incidents of the marriage relation, it had not extinguished quite all of the marital rights of the husband. The husband is still entitled to the benefits of his wife's industry and economy.

Closely related to transfers from husband to wife is the situation where a husband's property is purchased by an outsider at a bona fide sheriff's sale and is subsequently given to the wife. Under such conditions, the property is free from the claims of the husband's creditors.[116] Also of interest is the recognition by equity that a married woman may stand in the relation of a creditor of her husband. Clear and satisfactory evidence is necessary to establish the validity of the debt.[117] However, proof of the debt does not impose an obligation on the husband to pay interest, as he would if the debt were to other creditors.[118]

(c) The Wife's Earnings.—At common law, the services and earning capacity of the wife belonged to the husband alone. He was accordingly entitled to all of her earnings even before they were reduced to possession.[119] Likewise, if the earnings were the joint earnings of the husband and wife they belonged to the husband and not to the wife.[120] This was based on the theory that the husband was under a duty to support his wife and his family; therefore, he was entitled to their earnings.[121] Even after the Married Women's Property Act of 1848 the same rule of law prevailed.[122] Ordinarily, only the husband or his personal representative could maintain an action for the wages of the wife's labor and services. If, however, the employer made an express agreement with the wife, it appears that she could maintain an action for the wages after the husband's demise.[123]

114. Parvin v. Capewell, 45 Pa. 89 (1863).
115. 20 Pa. 308 (1853) This decision considers a wife's earnings and savings together; for the sake of logical development they have been divided in this note.
116. *E.g.,* Gibson v. Sutton, 3 Sadler 505, 6 Atl. 912 (Pa. 1886); Hess v. Brown, 111 Pa. 124, 2 Atl. 416 (1885); Wieman v. Anderson, 42 Pa. 311 (1862).
117. Tripner v. Abrahams, 47 Pa. 220 (1864).
118. Morrish v. Morrish, 262 Pa. 192, 105 Atl. 8 (1918).
119. Hallowell v. Horter, 35 Pa. 375 (1860).
120. McDermott's Appeal, 106 Pa. 358 (1884); Hallowell v. Horter, *supra* note 119.
121. See McDevitt v. Vial, 7 Sadler 585, 11 Atl. 645 (Pa. 1887).
122. McDevitt v. Vial, 7 Sadler 585, 11 Atl. 645 (Pa. 1887); Walker v. Reamy, 36 Pa. 410 (1860).
123. VERNIER, AMERICAN FAMILY LAWS § 173 (1935).

This doctrine did not coincide with the trend to give a wife the same rights as her spouse, and hence, the Act of May 3, 1872,[124] was enacted which gave married women the right to keep their separate earnings. It is an interesting side-light that in *Lewis Estate,*[125] where a married woman attended a boarder, cleaned his room, administered medicine to him, and later claimed compensation for her services, the court made no reference to the Act of 1872 but construed another statute [126] and allowed recovery, holding that the earnings belonged to her and not to her spouse. The result is still the law today.[127]

Household Property.—The presumption of the law is that where a man and woman are cohabitating as husband and wife, the household property belongs to the husband.[128] A wife claiming such property is required to substantiate her claim by proof sufficient to repel all adverse presumptions.[129]

Against this background came the lower court decision of *McCarter's Estate,*[130] which raised the question as to whether the furnishings of a home, such as a living-room suite, a player piano, and an electric ice-box, belonged to the wife upon her husband's death. The court in a well-reasoned opinion by Judge (now Mr. Justice) Ladner proceeded on the theory that the husband and wife lived together; therefore, there could be no separate possession for the property was at all times in the joint possession of the spouses. Hence, the inference to be drawn must be that the furniture so possessed was intended for the use, comfort and benefit of both, and in the absence of any proof to the contrary a fair presumption is that title was, in fact, in both husband and wife as tenants by the entireties. This being so, title to such property rests exclusively in the surviving spouse.

Subsequently, another court [131] recognized Judge Ladner's explanation but insisted on following the time-worn rule that household property is presumed to belong to the husband. It stated, however, that even under Judge Ladner's reasoning, the facts of this case did not support an estate by the entirety. Still later, the matter appeared to be settled finally when the Superior Court restated and adopted the old rule of a presumption in favor of the husband.[132] Then came another learned decision by Judge

124. PA. STAT. ANN., tit. 48, § 34 (Purdon, 1930): "The separate earnings of any married woman of the State of Pennsylvania, whether said earnings shall be wages for labor, salary, property, business or otherwise, shall accrue to and enure to the separate benefit and use of said married woman, and be under the control of such married woman independently of her husband . . ."

125. 156 Pa. 337, 27 Atl. 35 (1893).

126. Act of June 8, 1887, P.L. 332.

127. Martin v. Davis, 30 Pa. Super. 59 (1906). This case although stating and following the statutory rule, does not at any point cite the statute.

128. *E.g.,* McDevitt v. Vial, 7 Sadler 585, 11 Atl. 645 (Pa. 1887); Rhoads v. Gordon, 38 Pa. 277 (1861); Chadwick Estate, 154 Pa. Super. 157, 35 A.2d 582 (1943).

129. Kauffman v. Stenger, 151 Pa. Super. 313, 30 A.2d 239 (1943).

130. 36 D. & C. 625 (Pa. O.C. 1939).

131. May Estate, 63 D. & C. 634 (Pa. O.C. 1948).

132. Matheny Estate, 164 Pa. Super. 18, 63 A.2d 477 (1949).

Ladner in *Schwartz Estate*,[133] where the court explained why it refused to follow the old rule. It was pointed out that the old rule of law was based on the case of *Rhoads v. Gordon*,[134] decided in 1861. Since that time the Married Women's Property Acts of 1887[135] and 1893[136] rendered that case of no further precedent value. These Acts, in effect, unshackled married women and gave them the right to own and possess property, even though it appeared to be in the control of the husband. They raised the same presumption of ownership by the wife in regard to possession of personal property that existed in other individuals.[137] The court further pointed out that *Rhoads v. Gordon*, which was relied on by the Superior Court, was never cited for this proposition by the Supreme Court subsequent to the Acts of 1887 and 1893. Therefore, the court felt justified in following its earlier ruling and held that there is, as to ownership of household furniture and furnishings in the joint possession of the spouses, a fair presumption, in the absence of proof to the contrary, that title to the same is in both husband and wife by the entireties. But this decision was reversed on appeal to the Superior Court, which stated, "In Matheny Estate . . . we held that the presumption was that household goods belong to the husband. To this rule we adhere. It was based upon the duty of a husband to provide his wife with a home, which, of course, means household goods and not merely roof and walls. This duty of the husband is unaffected by the married women's property acts." [138]

Thus, it remains to be seen which position the Supreme Court will take. The "Ladner View" is based on the normal presumptions that flow from joint possession and use. It appears to be more consistent with the currently accepted philosophy that marriage is a partnership, with a wife being entitled to an equal interest in all household goods in return for her services rendered in caring for the children and making the home a place of comfort for the entire family. On the other hand, the Superior Court places prime emphasis on the duty of a husband to support his wife, and holds that this obligation, in the absence of other evidence, precludes a presumption of joint ownership in the property. In the long run the duty should fall upon the legislature, after considering carefully the numerous social and economic factors involved, to pass legislation which will properly mirror the best interests of society.

Gifts to the Husband and Wife Jointly.—Since the discarding of the common law rules, it is obvious that if any property is given expressly to a married couple, they become joint owners, and can only be so treated. But when can a chattel be said to be given to both husband and wife? It is very seldom that one hears of such a specific gift. The question whether a gift is to one or both seems to be a question of fact to be decided

133. 68 D. & C. 154 (Pa. O.C. 1949).
134. 38 Pa. 277 (1861).
135. PA. STAT. ANN., tit. 48, § 6 (Purdon, 1930).
136. PA. STAT. ANN., tit. 48, § 31 *et seq.* (Purdon, 1930).
137. *See* Fink's Estate, 77 Pa. Super. 267, 272 (1921).
138. Schwartz Estate, 166 Pa. Super. 459, 71 A.2d 831 (1950).

with regard to all the surrounding circumstances of the case. The question frequently arises in the case of wedding presents. Probably it can be assumed that a wedding present which is of a personal nature is meant for either husband or wife, *i.e.*, a jeweled bracelet would obviously be intended for the wife alone; diamond studs and cuff links would be intended for the husband. However, most wedding presents are intended to equip or adorn the home—a silver tray to be used on a common table, a painting to be hung over the fireplace in the living-room. Can these ever be said to be personal gifts to either spouse? In determining this issue it is proper to consider the origin of the gift, and the relationship of the donor to the husband or wife. In a few scattered instances the gift may be shown to be a personal gift to one of the spouses, but generally presents which are to be used or enjoyed jointly should be considered the same as property purchased by the spouses jointly,[139] and hence should belong to the husband and wife by the entireties.

Effect of Divorce on Property Owned by the Spouses

There is not much "law" with regard to the property rights of the spouses upon either an absolute or limited divorce. This appears to result from: (1) the fact that property rights are generally settled between the former spouses, or (2) the cases are adjudicated in county courts, whose opinions are not reported, and the parties do not appeal. Hence, the following is merely an exposition of the reported "law" on this subject.

Divorce A Vinculo Matrimonii.—At common law the property interests of the spouses were considerably affected by a divorce from the bonds of matrimony—*a Vinculo Matrimonii.* Blackstone said ". . . in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*. . . ."[140] This would seem to indicate that the former husband lost all rights in his former wife's realty. Further, it appears that the wife recovered all of her personal property, choses in action and chattels real. Chancellor Kent indicates that this harsh rule was abrogated by statutes in the colonies, so that the disposition of property depended upon who was the injured party. If it was the wife, she regained possession of all of her real and personal property; if it was the husband, he retained his interest in the wife's property.[141]

Today, an absolute divorce does not produce such marked changes in property rights. This is because of the Married Women's Property Acts, which allows a wife to hold separate property. Therefore, upon divorce each party takes the property (real or personal) which belonged to him or her before and during the marriage. As to common property such as household goods, the law is still unsettled. As indicated previ-

139. Remaley v. Remaley, 37 Luzerne L. Reg. 411 (Pa. C.P. 1944.)
140. 1 Bl. Comm. *440.
141. 2 Kent Comm. *99.

ously, there is a presumption of ownership by the husband, and if this is not overcome, apparently upon divorce, the husband takes all of the household furniture and furnishings.

Tenancy by the entireties presents a different problem upon divorce. In most jurisdictions since the divorce dissolves the so-called entity of the spouses upon which the theory of tenancy by the entireties is based, such a tenancy cannot continue after divorce and becomes either a joint tenancy or a tenancy in common.[142] Pennsylvania courts once took a contrary view, holding that an estate held by the entireties is not terminated by a divorce.[143] They refused to allow a husband to maintain an action of assumpsit against his divorced wife for rents and profits, accruing after divorce, from real estate and personalty acquired during coverture, holding that the former spouses still held by the entireties in all respects.[144] This doctrine, although not expressly overruled, was modified by the decision of *O'Malley v. O'Malley*.[145] In that case the court said that although the character of the tenancy is not changed by an absolute divorce of the parties, as between the parties a different situation arises. Hence, if a fund consisting of the rents and profits of such property held by the entireties is before the court for distribution, it will be equally divided between the former husband and wife—no other equities intervening—since upon divorce they become, for all practical purposes, tenants in common as to rental income. The rationale of that decision was that a gross inequity would result where one former spouse, who has theoretically an equal right with the other, takes *all* of the fund. The court foresaw the possibility of bodily harm being committed and the public peace being disturbed if the other former spouse forcibly endeavored to obtain his or her legal rights. It believed that these considerations gave a powerful warning that a conclusion which results in such an injustice is imbued with error and should be eliminated.[146] This doctrine has been applied even when after divorce one of the parties continues to occupy real estate held by the entireties; that former spouse is liable to the other for the fair rental value of the property less expenses necessarily paid for the preservation of the property.[147] Also a divorced wife who had previously obtained a judgment for the support of the children of the marriage can enforce it against property formerly held by the entireties as if there had been no divorce.[148]

142. VERNIER, AMERICAN FAMILY LAWS § 97 (1932).

143. *E.g.*, Alles v. Lyon, 216 Pa. 604, 66 Atl. 81 (1907); Witman v. Webner, 25 Berks 29 (Pa. C.P. 1923), *aff'd*, 108 Pa. Super. 188, 165 Atl. 256 (1933); Magee v. Morton Building & Loan Ass'n., 103 Pa. Super. 331, 158 Atl. 647 (1931).

144. Hilt v. Hilt, 50 Pa. Super. 455 (1912).

145. 272 Pa. 528, 116 Atl. 500 (1922).

146. Cornelius v. Cornelius, 104 Pa. Super. 455, 160 Atl. 150 (1932).

147. Mertz v. Mertz, 28 Del. 138, 35 D. & C. 26 (Pa. C.P. 1939), *rev'd on other grounds*, 139 Pa. Super. 299, 11 A.2d 514 (1940). The property in question here was acquired before the Act of May 10, 1927, *infra*, and hence it was held not to apply.

148. Act of May 24, 1923, P.L. 446, § 5, PA. STAT. ANN., tit. 48, § 141 (Purdon, 1930).

Under the Act of May 10, 1927,[149] property held by a husband and wife as tenants by the entireties is upon divorce conclusively presumed to belong one-half to each party.[150] This in effect codifies the rule of law developed by the courts in order to prevent considerable injustice.

Some county courts interpreting the Act said it did not apply to personalty;[151] others said it applied to personal property as well as to realty.[152] The dispute was finally resolved by the Supreme Court's holding that the Act gives divorced spouses a remedy of partition in equity of property held by the entireties whether real, personal or a chose in action and whether the estate is equitable or legal.[153]

Divorce A Mensa Et Thoro.—A divorce *a mensa et thoro* creates a legal separation from bed and board, but it does not put an end to the marriage ties, it merely suspends certain mutual rights and obligations of the parties for a limited time.[154] It has even been declared that a divorce from bed and board is little more than an adjudication, by a court of competent jurisdiction, that the wife could live apart from her husband without being guilty of desertion and still remain a wife.[155] Reconciliation and cohabitation of the husband and wife after such a divorce restores the marriage relationship and the rights of the respective spouses which flow therefrom.[156]

Generally the statutes dealing with the effect of an absolute divorce on the property of the spouses are so phrased as to admit of their being applied to an action for divorce *a mensa et thoro.* Hence, property rights in a divorce from bed and board are the same as those which exist in a divorce from the bonds of matrimony.

As long as the decree remains in force, the wife, under the Act of April 11, 1927,[157] has power to encumber and convey her separate real estate in the Commonwealth, whether acquired before or after the decree,

149. PA. STAT. ANN., tit. 68, § 501 *et seq.* (Purdon, 1931): "In any case where a husband and wife shall hereafter acquire property as tenants by entireties and shall be divorced, the interest of each of the respective tenants by entireties, subsequent to said divorce, shall be conclusively deemed to be one-half of the value of the property. . . ." This was amended by the Act of May 17, 1949, PA. STAT. ANN., tit. 68, § 501 *et seq.* (Purdon Supp. 1949), which adds that upon divorce the parties shall hold the property as tenants in common of equal one-half shares.

150. Cox v. Cox, 35 Del. 422 (Pa. C.P. 1949); Edwards v. Edwards, 69 D. & C. 136 (Pa. C.P. 1948); Lanare v. Lanare, 76 A.2d 190 (Pa. 1950) construed the 1927 Act strictly and held tenancy did not end until sale).

151. Barrett v. Barrett, 7 Lawrence 20, 62 D. & C. 362 (Pa. C.P. 1948).

152. Wells v. Brown, 63 Montg. 310, 61 D. & C. 511 (Pa. C.P. 1948).

153. Blumner v. Metropolitan Life Ins. Co., 362 Pa. 7, 66 A.2d 245 (1949).

154. Hill v. Hill, 62 Pa. Super. 439 (1916).

155. *See* Rutherford v. Rutherford, 152 Pa. Super. 517, 525, 32 A.2d 921, 926 (1943).

156. Rudolph's Estate, 128 Pa. Super. 459, 194 Atl. 311 (1937).

157. PA. STAT. ANN., tit. 48, § 117a (Purdon, 1930): "Whenever a decree of divorce from bed and board . . . [be] granted to any married woman . . . it shall be lawful for such married woman to encumber . . . or dispose of, real estate . . . or any interest therein, however and whenever acquired, whether before or after the entry of such decree, with as full and complete power in all respects as if she were a feme sole, and without her husband joining in, consenting to, or acknowledging any deed, mortgage, or other instrument. . . ."

as though she were a *feme sole.* In *Scaife v. McKee,*[158] plaintiff, was divorced from her husband *a mensa et thoro.* Subsequently, she agreed to convey to defendant three properties which she owned. Defendant refused to accept the deed and pay the purchase price, solely because plaintiff's husband had not joined in the conveyance. The court held that the 1927 Act does not provide merely for the conveyance of the wife's interest in her real estate, leaving the husband's possible tenancy by the curtesy[159] unaffected by the wife's deed, but gives to the wife the right to convey "with as full and complete power in all respects as if she were a feme sole," that is, a fee simple title, unencumbered by any interest the husband would have had but for the divorce.

In addition to these tangible rights which a wife may receive in a divorce *a mensa et thoro,* she may also be entitled to seek permanent alimony.[160] This is commonly referred to as an intangible property right and is an exceptionally important and valuable right, since it may compensate her for the loss of some of her other property interests. The husband in this situation must support his wife in keeping with his financial condition.[161]

Conclusion

Property rights of the spouses has been a constantly changing concept to fit the particular needs and ideals of the time. We have now reached a point where in social thought man and wife are generally considered equals. Courts have struggled with sporadic legislative enactments and archaic decisions in order to harmonize the law with this philosophy but complete accord has not been reached.

Particularly uncertain are the rights of spouses in household property. This problem faces families of modest means, and their interests in this type of property should be so clarified as to render unnecessary expensive litigation in order to determine their existing rights. Otherwise, many such interests may be lost by default. Arguments previously noted point toward the desirability of granting a wife an equal share in this property.[162]

Inequities may also result from the Court's refusal to allow a spouse to obtain an accounting of property held by the entireties. Currently, it appears that, at a minimum, the spouses must be separated and fraud must be present before such a right exists. Since existing conditions may preclude spouses from living apart, even though their love for each other has dissipated, it would appear desirable for a spouse to be permitted an

158. 298 Pa. 33, 148 Atl. 37 (1929).

159. Estate by curtesy has been abolished in Pennsylvania by the Act of April 24, 1947, P.L. 80, § 5, Pa. Stat. Ann., tit. 20, § 1.5 (Purdon, 1950). There is now a statutory share in lieu of curtesy.

160. Comm. v. Scholl, 156 Pa. Super. 136, 36 A.2d 719 (1944); Act of May 2, 1929, P.L. 1237, Pa. Stat. Ann., tit. 23, § 47 (Purdon, 1930).

161. Kaufmann v. Kaufmann, 166 Pa. Super. 6, 70 A.2d 481 (1950); Com. *ex rel.* Hirst v. Hirst, 113 Pa. Super. 159, 163, 172 Atl. 160, 162 (1934).

162. See text fol. note 138 *supra.*

accounting whenever he has reasonable grounds to believe that his interest in such property is not being protected.[163] In this connection it is interesting to note that although the current rule may appear to favor neither spouse, the one who does not have immediate control and possession of the property—generally, the wife—is placed under a disability.

However, the scales are not always tipped in favor of the husband. The rule that implies the creation of a trust in favor of a wife when she transfers property to her husband represents an early attempt to counteract the complete subservience of wives to their husbands. Although the rule probably still retains much vigor, a re-examination of it is desirable in view of the increased stature and independence now attributed to married women.

It remains for the Assembly to make an exhaustive study of the property rights of spouses and enact clarifying legislation. Consideration should be given to the advisability of enacting a complete judicial code in this area similar to that enacted in the field of wills and decedent estates.[164] The goal should be a combination of ideals and reality into one finite pattern.*

Harold Cramer

Price Fixing and Royalty Provisions in Patent Licenses

The Federal Constitution declares that Congress shall have power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries." [1] Consonant with this provision, it was decided that the reward for invention should be through exploitation scaled to supply-demand rather than by direct government subsidy. The patent system that has arisen since the first patent statute became effective in 1790 has played a vital role in the industrial growth of the United States and has also raised a host of problems. Most basic, perhaps, are the determination of what constitutes sufficient progress in science or the useful arts to merit reward as invention, and the determination of the nature and compass of the reward to be granted to the inventor-investor-entrepreneur. This Note deals with several aspects of the latter of these problems.

Background

As the corporate form of organization continues to increase in size and concentration, the question of how far the patent holder is to be allowed to decide for himself, through contractual agreement, the extent of his reward

163. See text fol. note 53 *supra.*

164. PA. STAT. ANN., tit. 20 (Purdon, 1950).

*While this note was at press the case of Fine v. Fine, No. 260, Jan. 2, 1951, was decided by the Supreme Court of Pennsylvania. In an opinion written by Mr. Justice Stearne the court held that there is no presumption of ownership of household goods by a husband and that the burden of proving ownership of such goods rests upon the spouse claiming the same.

1. U.S. CONST. Art. I, § 8.

for his patent franchise in the public domain looms ever larger. The identity of the inventor has become largely corporate instead of individual. As a result, the "clash and clang" of the patent and anti-trust laws has become an arousing crescendo,[2] and "the call is to create incentives to the promotion of the industrial arts with the least hazard to the system of free enterprise." [3]

Concurrent with these changes in our economy, licensing, rather than individual exploitation, has become a preferred means by which maximum returns may be realized by patentees. The right to license a patent rests upon the law of contracts [4] and is not provided for in the patent statutes [5] as is the right to assign a patent.[6] A license passes no property interest in the patent to the licensee, but only allows the licensee to make, use, or vend the subject of the patent.[7] The Supreme Court has long stated that a patentee can enforce restrictions and conditions in a license as to the use of the patent by the licensee.[8] However, the enactment by Congress of the Sherman Act [9] and Section 3 of the Clayton Act [10] has been followed by the pronouncement of increasingly stringent limitations upon the right of a patentee to control a licensee's conduct. Price restrictions in patent license contracts have been particularly controversial.

Price control exerted by one source is contrary to the basic concept of a price structure determined by a freely competitive market which underlies a free enterprise economy. The Court took a clear-cut stand on price control agreements of non-patented goods in *United States v. Socony-Vacuum Oil Company* [11] and held that such agreements and combinations were illegal restraints of trade under the Sherman Act, irrespective of the reasonableness of their effect on prices or the desirability of other purposes of the agreement.[12] Resale price maintenance after the initial sale is also held illegal per se, except as permitted under the State Fair Trade Acts and various agency plans.[13]

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2. See Abramson, *Economic Bases of Patent Reform,* 13 LAW AND CONTEMP. PROB. 339, 346 (1948).

3. HAMILTON, PATENTS AND FREE ENTERPRISE 169 (TNEC Monograph 31, 1941).

4. Brown Paper Co. v. Hydroloid, 32 F. Supp. 857 (S.D.N.Y. 1939); United States v. American Bell Tel. Co., 29 Fed. 17 (S.D. Ohio 1886).

5. The patentee's common law right to make, use and vend is incorporated in the federal patent statutes. 16 STAT. 201 (1870), 35 U.S.C. § 40 (1930); Bauer and Cie v. O'Donnell, 229 U.S. 1, 10 (1913); Crown Tool and Die Co. v. Nye Tool Co., 261 U.S. 24, 35 (1923).

6. 16 STAT. 203 (1870), as amended, 35 U.S.C. § 47 (1941).

7. U.S. v. General Electric, 272 U.S. 476, 489 (1926).

8. Rubber Co. v. Goodyear, 9 Wall 788 (U.S. 1869).

9. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1937).

10. 38 STAT. 731 (1914), 15 U.S.C. § 14 (1937).

11. 310 U.S. 150 (1940); see F.T.C. v. Cement Institute, 333 U.S. 683 (1948).

12. United States v. Trenton Potteries Co., 273 U.S. 392 (1927); see WOOD, PATENTS AND ANTITRUST LAW 41-44 (1942). *But cf.* Appalachian Coals Inc. v. United States, 288 U.S. 344 (1933); Maple Flooring Assn. v. United States, 268 U.S. 563 (1925); Chicago Board of Trade v. United States, 246 U.S. 231 (1917).

13. Dr. Miles v. Park and Sons Co., 220 U.S. 373 (1911). *But cf.* United States v. Colgate and Co., 250 U.S. 300 (1919), Beech Nut Co. v. F.T.C., 257 U.S. 441 (1922). Retail price maintenance through agency agreements with retail dealers was held legal in United States v. General Electric Co., 272 U.S. 476

Patented goods stand on the same footing as other goods in interstate and foreign commerce with regard to resale price maintenance, for the patent owner cannot in any way control the price of patented goods once the patentee or his licensee has sold the goods.[14] But the *Bement*[15] and *General Electric*[16] decisions, which allowed patentee to fix the price at which the licensee can sell the patented goods, provided a broad basis for price restrictions in patent licenses. This is a major judicial exception to the broad prohibition against price control.

Price Control Through Patent Licenses

Patented Materials and Materials Embodying Patented Elements.— The *Bement* case was decided in 1903 before the problems of price controls by private businessmen had been brought into sharp focus in the light of the sweeping language of the Sherman Act. There, improvement patents[17] "relating to" float harrows were held to support license restrictions setting the price of the entire unpatented harrow manufactured and sold by licensee. This decision apparently held that a patentee might set the price of any article embodying the patented part. Subsequently, the issue of the legality under the Sherman Act of price control by a patentee of his licensee's sales was again presented to the Court in *United States v. General Electric Co. in 1926.*[18] Defendant patentee owned two combination patents, one on an incandescent lamp with tungsten filaments and one on a lamp filled with an inert gas, also a process patent on a method of increasing the tensile strength of tungsten filaments.[19] The original lamp patents on combinations employing carbon or vanadium filaments in a partial vacuum had expired, but the patentee's dominant economic position had been continued by the issuance of improvement patents in which old elements of the old combination were replaced by new elements [vanadium by tungsten] or in which novel elements were added [*e.g.,* an inert gas such as argon].[20] These improve-

(1926). State Fair Trade Acts and the Miller-Tydings Act provide for resale price maintenance of trade marked or identified goods. 50 Stat. 693 (1937), 15 U.S.C. § 1 (1937). But any form of resale price agreement between competitors is forbidden. United States v. Masonite Corp., 316 U.S. 265 (1942).

14. United States v. Univis Lens Co., 316 U.S. 241 (1942); Boston Store v. American Graphophone Co., 246 U.S. 8 (1918).

15. Bement v. National Harrow Co., 186 U.S. 70 (1902).

16. United States v. General Electric Co., 272 U.S. 476 (1926).

17. See note 15 *supra* at 71. Plaintiff had assembled some eighty-five improvement patents on harrow parts which did not cover the entire harrow. See National Harrow Co. v. Bement and Sons, 47 N.Y. Supp. 462, 464 (1895); National Harrow Co. v. Quick, 67 Fed. 130, 131 (1893). The Supreme Court simply held that price restrictions in a single patent license did not violate the Sherman Act and did not consider the broader issue raised by the plaintiff's assembling of patents to control the entire industry.

18. 272 U.S. 476 (1926).

19. *Id.* at 480.

20. ". . . the addition of a totally new and useful element to an old combination may be patentable; but the addition must be the result of invention rather than the mere exercise of the skill of the calling, and not one plainly indicated by the prior art." Textile Machine Works v. Hirsch Co., 302 U.S. 490, 497 (1938). "Through these devices the original monopoly is again rendered effective . . . ." Forkosch, *Economics of American Patent Law,* 17 N.Y.U.L.Q. Rev. 157 and 406, 192-3 (1940).

ment patents "covered completely the making" of the lamps.[21] In holding that such a combination patent would support fixing of the manufacturing licensee's prices for that particular patented combination, the Court cited the *Bement* case as controlling. However, it did not expressly limit the former holding to the narrower facts of the *General Electric* case, but simply stated that licensee price control was a condition of sale "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly," since it prevented licensee from competing with patentee so as "to destroy" the latter's profits from his own manufacture and sale of the patented goods.[22]

Recent Supreme Court decisions have placed more definite limitations on the patentee's licensing power. For example, the owner of a combination or system patent may not use it to price fix or monopolize any portion of an unpatented device which is an element of the patented combination, even though the unpatented element is the most vital and distinguishing part of the patented invention.[23] Nor can a patentee tie-in, price fix, or in any way monopolize the unpatented supplies or raw materials processed into its patented product or used in or with its patented article, process, or machine.[24] In *United States v. Gypsum*,[25] the Court condemned, as exceed-

21. United States v. General Electric Co., 272 U.S. 476, 481 (1926). But see Steffen, *Invalid Patents and Price Control*, 56 YALE L.J. 1, 3 (1946); HAMILTON, PATENTS AND FREE ENTERPRISE 102 (TNEC Monograph 31, 1941); Kelleher, *Price-Fixing under Patent License Agreements*, 3 MONT. L. REV. 5, 31 (1942). It would seem that Mr. C. J. Taft accurately interpreted the coverage of the claims of at least the two combination patents owned by General Electric which were distinguishable in type from the Bement improvement patents on separate elements of float spring tool harrows.

22. United States v. General Electric Co., 272 U.S. 476, 490 (1926). It is said that business prudence would compel a patentee not to license unless he can control his licensee's price competition, thus depriving the public of the advantages of quality competition. ELLIS, PATENT ASSIGNMENTS AND LICENSES 435 (2d ed. 1943). However, this justification places the reward to the inventor ahead of the public interest in the promotion of science and useful arts with the least damage to our free enterprise system. The Constitution does not entitle the patentee to the highest possible reward. *See* United States v. Line Material Co., 333 U.S. 287, 318 (1948) (J. Douglas's concurring opinion).

23. Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944); Mercoid Corp. v. Minn.-Honeywell Regulator Co., 320 U.S. 680 (1944). The doctrine of contributory infringement was severely curtailed if not demolished by these cases, although it may still be enforceable where there is no misuse of patents. See James, *Use of Patents to Control Unpatented Materials*, 28 J. PAT. OFF. SOC. 427 (1946); Bateman, *Should Antitrust Penalties or Unenforceability of the Patent Monopoly be Invoked for Misuse of the Patent Grant*, 29 J. PAT. OFF. SOC. 16 (1947).

24. International Salt Co. v. United States, 332 U.S. 392 (1947): B. B. Chemical Co. v. Ellis and Magic Tape Co., 314 U.S. 495 (1942); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1942); Carbice Corp. v. American Patents Dev. Co., 283 U.S. 27 (1931); Motion Picture Patents Co. v. Universal Film Co., 243 U.S. 502 (1917); McCullough v. Kammerer Corp., 166 F.2d 759 (9th Cir.), *cert. denied*, 335 U.S. 813 (1949); Standard Register Co. v. American Salebook Co., 148 F.2d 612 (2d Cir. 1945); Landis Machine Co. v. Chaso Tool Co., 141 F.2d 800 (6th Cir. 1944); Dehydrators Ltd. v. Petrolite Corp. Ltd. 117 F.2d 183 (9th Cir. 1941); Barber Asphalt Corp. v. La Fera Grecco Trucking Co., 116 F.2d 211 (3d Cir. 1940); Phila. Co. v. Lechler Laboratories, 107 F.2d 746 (2d Cir. 1939); Oxford Varnish Corp. v. Ault and Wiborg Corp., 83 F.2d 764 (6th Cir. 1936); R.C.A. v. Lord, 28 F.2d 257 (3d Cir. 1928).

25. 333 U.S. 364, 400 (1948).

ing the patent monopoly in violation of the Sherman Act, the stabilization of the prices of unpatented plaster manufactured and sold by patentee and its licensees in conjunction with patented plaster board for use in installing such board. The patentee had issued bulletins stating that the licenses would be violated if the licensee reduced the price of the plaster or other non-patented products sold with the patented board, or if he granted rebates.

The *General Electric* case was reconsidered recently in *United States v. Line Materials Co.*,[26] which held that an arrangement whereby two or more competing patentees agreed that one of them or one of their licensees would fix prices for all transcends the limits of the patent monopoly and violates the Sherman Act. In a concurring opinion written by Justice Douglas, and joined in by Justices Black, Murphy, and Rutledge, it was stated that the *General Electric* doctrine should be overruled, since it is a private perquisite written into the patent laws by judicial legislation, and patentees should be limited to a non-price fixing royalty reward or to the manufacture and sale of the patented subject matter by themselves at any price that they choose. Justice Douglas noted that by allowing a patentee to combine with his competitors to fix the prices of the products of invention, a powerful inducement is created "for the abandonment of competition, for a cessation of litigation concerning the validity of patents, for the acceptance of patents no matter how dubious, for the abandonment of research in the development of competing patents," which is more than the "exclusive right" given by the Constitution.[27] Price fixing under the General Electric case has become an end in itself rather than a means for securing to inventors their reward. Two of these Justices, Rutledge and Murphy, are now deceased and the viewpoints of their successors, Justices Minton and Clark, although not yet wholly ascertained, seem to favor a broader construction of the patent holder's rights.[28] The opinion of the court supported only by its writer, Justice Reed, upheld the *General Electric* case but limited it strictly to its facts, distinguishing the instant case on the presence of the cross-licensing.[29] The three dissenting Justices held that the *General Electric* case was binding precedent and that the instant case should not be distinguished. Thus the battle lines have been drawn and the eventual overthrow of the *General Electric* doctrine is forecast.[30]

The lower federal courts have reflected the changing attitude in this area of the law. In the recent *Carboloy*[31] case price control of unpatented

26. 333 U.S. 287 (1948).

27. *Id.* at 319.

28. See Automatic Radio Mfg. Co., Inc. v. Hazeltine Research, Inc., 339 U.S. 827 (1950).

29. Price restrictions may be imposed solely to protect the particular patentee and not licensees or other patentees. See Stedman, *Patents and the Anti-Trust Laws*, 31 J. PAT. OFF. SOC. 14, 21 (1949). *But cf.* Westinghouse Electric Corp. v. Bulldog Electric Products Co., 179 F.2d 139 (4th Cir. 1950).

30 United States v. Paramount Pictures, 334 U.S. 131, 144 (1948) condemned a price structure which eliminated price competition between copyright licensees and distinguished the 1926 *General Electric* decision.

31. United States v. General Electric Co., 80 F. Supp. 989, 1004 (S.D.N.Y. 1948). *Contra:* General Electric Co. v. Willey's Carbide Tool Co., 33 F. Supp. 969 (E.D. Mich. 1940).

goods embodying patented components was condemned. It was noted that the cost of the patented component was about one-third to one-half the cost of the finished tool. On this point the court relied on the *Mercoid* [32] case, and the *General Electric* case was not mentioned. Earlier, a similar problem was faced by a district court when the government instituted a civil action under the Sherman Act against a parking-meter patents holding company and its manufacturing licensees, who controlled 95-98% of the meter business in the United States. The court pointed out that license restrictions fixing the prices of adjunctive devices not within the claims of the meter patents, such as coin counters, standards, collars, and "specialties," which were embodied in the final complete installation sold to the ultimate consumer municipality, etc., were "obviously *not* bottomed on the patent statute and were far beyond the claims on which the lawful monopoly rests." [33] Further, compulsory licensing at a reasonable royalty was ordered and the 1926 *General Electric* decision was distinguished primarily on the ground that the patentee did not itself manufacture parking meters. Therefore, even as to the patented parking meter devices, the price restrictions in the licenses were for the licensees' benefit and not to protect the patentee's pecuniary incentive reward, the avowed basis of Chief Justice Taft's decision in the *General Electric* case.

Thus, no matter how close the connection of unpatented materials with the subject matter of the patent, the patentee apparently may not fix their price or in any other way exert monopoly control over them. Anything that exceeds the precise scope of a valid patent grant cannot be brought within any patent licensing arrangement so as to enable the licensor to derive his pecuniary reward from the unpatented material. The patentee, if he also manufactures the patented subject matter, can fix the price that his manufacturing licensee can charge but he cannot fix the resale price of the patented product.

Products of Patented Processes and Machines.—Somewhat the converse of attempts to control the price of unpatented supplies and components for patented machines, processes or articles are provisions in licenses of patented processes and machines to fix the prices, sales terms, sales territories, production, etc. of unpatented products turned out by the patented process or machine. Logically, in view of the consistently strict limitation of the patent monopoly, it should be clear that a patentee has no such right of control by virtue of his patent grant.[34] And when the point squarely arose for the first time in a suit for an accounting of royalties under a license of patents on brick setting machines and brick loading forks which fixed the price of the bricks produced, the Seventh Circuit held that the entire license contract was void since such a

32. Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944).

33. U.S. v. Vehicular Parking Ltd., 54 F. Supp. 828, 836 (D. Del. 1944). License restrictions on meter servicing charges by licensee were also held not within the protection of the meter patents.

34. See Stedman, *Patents and the Anti-trust Laws,* 31 J. PAT. OFF. SOC. 14, 19 (1949).

price control clause violated the Sherman Act, citing the *Motion Picture Patents* case,[35] and was not severable from the remainder of the license contract.[36] This was a sound result in view of the early Sherman Act case of *Standard Sanitary Mfg. Co. v. United States*[37] in which one of the defendants, which together produced 85% of enameled iron ware in the nation, had licensed its manufacturing competitors to use a patented mechanical sieve, which spread the glaze powder much more quickly and uniformly on the heated ironware than was possible with previous hand operated sieves, on condition that the licensor fix the prices and sales terms of all enamel ware produced by the licensees. The lower court held that the tool patentee could not fix the price of the unpatented ware produced with the aid of the patented tool and thus that the individual licenses were illegal.[38] The Supreme Court affirmed but held that all the license agreements together established an unlawful combination whose purpose and effect was to eliminate competition throughout the industry, and on this ground distinguished the *Bement* case.

Yet, subsequent to these decisions, the Second Circuit held, in an action for royalties from the license of a patented basket making machine, that such licenses could establish the price at which the licensee might sell the unpatented baskets produced by the patented machine, and cited the *Bement* and *General Electric* cases.[39] The district court in *United States v. Standard Oil of Indiana* had previously for purposes of argument, "conceded that such restrictive covenant may include a commodity which, though not covered by a patent, is the product of a patented process."[40] Much doubt has been expressed as to the soundness of the Second Circuit holding,[41] which is in direct conflict with other circuits. The Sixth Circuit held in 1943 that the 1926 *General Electric* case did not permit the patentee to enforce a license provision fixing prices on unpatented hobs or gear-cutting tools produced by licensee under the plaintiff's patented grinding process by a patented grinding machine;[42] and the Fifth Circuit in a 1944 decision, the Supreme Court denying certiorari, held that both a price-fixing clause in patentee's licenses of patented basket-making machine attachment and the oral agreements thereunder to maintain a uniform price fixed by patentee on all baskets made and sold by licensees were illegal under the Sherman Act and Texas antitrust statutes. It, therefore, dis-

35. 243 U.S. 502 (1917).

36. American Equipment Co. v. Tuthill Bldg. Material Co., 69 F.2d 406 (7th Cir. 1934).

37. 226 U.S. 20 (1912).

38. United States v. Standard Sanitary Mfg. Co., 191 Fed. 172 (4th Cir. 1911).

39. Straight Side Basket Corp. v. Webster Basket Co., 82 F.2d 245 (2d Cir. 1936).

40. 33 F.2d 617, 629 (N.D. Ill. 1929).

41. Judge Learned Hand suggested in United States v. Aluminum Corp. of America, 148 F.2d 416, 438 (2d Cir. 1945) that the Second Circuit considered the problem to be "in flux." See Blenko, *Price Fixing of Unpatented Products,* 19 J. PAT. OFF. Soc. 371, 387 (1937).

42. Barber-Colman Co. v. National Tool Co., 136 F.2d 339 (6th Cir. 1943).

missed the action for damages brought by some of the licensees against the licensor.[43]

In view of these holdings it is highly unlikely that any attempt by a patentee to directly set the prices of unpatented products would be approved as "reasonably within the reward which the patentee by the grant of the patent is entitled to secure." [44] Certainly the broad language of the Supreme Court in the "improper use" cases that "every use of a patent as a means of obtaining a limited monopoly of unpatented material is prohibited —whether the patent be for a machine, a product or a process" [45]—indicates that a machine or process patent no more sanctions control over the licensee's products than it sanctions control over the material used with the process or machine.

Price Fixing Under Invalid Patents.—It would seem at first glance to be unthinkable that a patentee could use an invalid patent to support his price fixing. However, since the judicial standard of inventiveness deemed necessary for a valid patent seems to be considerably higher than the standard applied by the patent office,[46] and since the validity of relatively few patents is litigated in infringement suits or appeals from interference proceedings, the end result may be in many situations that an unsound patent is employed to support license restrictions. Of course once a patent is declared to be invalid, any price fixing agreements based upon it are illegal. But the expense of defending a patent suit for infringement may induce a businessman to accept license control without litigating. And since it was formerly settled law that a licensee was estopped from contesting the validity of his licensor's patent,[47] a wealthy and clever patentee might establish an almost impregnable position for himself on the basis of patent claims unlikely to be tested in the judicial forum. Until recently, even the Justice Department was unable to raise the issue of the validity of defendants' patents in an anti-trust suit.

However, a dictum in the *Gypsum* case [48] established that the government is not estopped to dispute the validity of patents which are set up by defendants in defense of alleged anti-trust violations. And in the *Sola,*[49] *MacGregor,*[50] and *Katzinger* [51] cases the courts held that the mere

43. Cummer-Graham Co. v. Straight Side Basket Corp., 142 F.2d 646 (5th Cir. 1944), *cert. denied,* 323 U.S. 726 (1945). It is interesting to note that in this case the *licensees* were suing the *patentee* for price cutting in breach of the license agreement.

44. United States v. General Electric Co., 272 U.S. 476, 490 (1926).

45. Leitch Mfg. Co. v. Barber Co., 302 U.S. 458, 463 (1938); Aero Spark Plug Co. v. B. G. Corp., 103 F.2d 290, 294 (2d Cir. 1939).

46. Picard v. United Aircraft Corp., 128 F.2d 632, 641 (2d Cir. 1942) (Judge Frank's concurring opinion).

47. Kinsman v. Parkhurst, 18 How. 289 (U.S. 1855); United States v. Harvey Steel Co., 196 U.S. 310 (1905).

48. United States v. U.S. Gypsum Co., 333 U.S. 364, 386-8 (1948).

49. Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942).

50. MacGregor v. Westinghouse Electric and Mfg. Co., 329 U.S. 402 (1947).

51. Katzinger Co. v. Chicago Metallic Mfg. Co., 329 U.S. 394 (1947); *cf.* Scott Paper Co. v. Marcalus Mfg. Co., Inc., 326 U.S. 249 (1945).

presence of a price fixing agreement in a patent license, though unenforced by the licensor, subjects the patentee to the risk of being compelled to submit the validity of his patent to the suspicious scrutiny of courts bent on protecting the public against unnecessary monopoly, if he wishes to sue for damages or unpaid royalties or to enforce license restrictions. Thus, the power of private litigation to purge our economy of invalid patent restraints was greatly enlarged, and courts may now consider the question of the validity of any patent where an illegal restraint of trade might result from a licensing condition.

Indeed, in the *Katzinger* case, the Court said that it was immaterial that the licensee had covenanted not to contest patent validity after termination of the agreement, for a private party may not contract to preclude iself from protecting the public interest.[52] Nor can the price fixing provisions of licenses be severed from the rest of the license agreement.[53] To permit severance would allow the old estoppel rule to bar the licensee's defense of patent invalidity at the will of the licensor.

Still another limitation upon the estoppel doctrine is imposed by the cases which declare that although a licensee may be estopped to challenge patent validity he may always show the prior state of the art involved in an infringement suit and that he was merely practicing the teachings of the prior art, since the court may examine the prior art to determine the scope, as distinct from the validity, of the patent in question.[54] However, where no price-fixing is attempted, the general rule that a licensee may not challenge the validity of the licensed patent in a suit for royalties retains its former vigor,[55] although it has been strongly criticized.[56]

Thus, it is seen that the perils of price fixing in patent licenses are numerous and the permissible area of price restriction narrow. Courts are reflecting the spirit of the times in tending to limit sharply the wielding by private organizations of powers that are near governmental in their scope and which have a rigidifying impact upon our economy. For our competitive system envisions that the natural drive of individuals for a "sure thing" will keep the economy dynamic and defeat the too successful attainment of the individual goal of monopoly. Patent litigation is uncertain at best and price control provisions increase the odds against the patentee several-fold, for they act as a red flag, a warning bell to alert the courts, which regard such restrictions as among the most dangerous threats to the maintenance of a free enterprise system. For, "the very existence of such restriction suggests that in its absence a competing article of equal or better quality would be offered at the same or at a lower

52. Katzinger Co. v. Chicago Metallic Mfg. Co., 329 U.S. 394, 400 (1947).

53. *Id.* at 401.

54. Sinko Tool and Mfg. Co. v. Casco Products Corp., 89 F.2d 916 (7th Cir. 1937); see TOULMIN, HANDBOOK OF PATENTS 513 (1949).

55. Automatic Radio Mfg. Co., Inc. v. Hazeltine, 339 U.S. 827 (1950).

56. "To estop the licensee from attacking the validity of patents is to forget that 'It is the public interest that is dominant in the patent system.'" *Id.* at 839 (J. Douglas's dissent).

price. . . ." [57] The variety of royalty provisions available to the patentee frequently provide him a more flexible and certain means of reward.

ROYALTY PROVISIONS IN PATENT LICENSES

The broad sweep of the Sherman Act and the statutes and decisions implementing its policy does not interdict the supplier of raw material, parts and services from charging as high a price as he anticipates will be consistent with an optimum return. Entrepreneurs of bold faith in their own judgment and capacities are not prohibited from applying their foresight and nerve to predict and assume the risks involved in seeking greater production and wider markets. The holder of a patent grant is in the position of a sole supplier of a piece of technology. He can keep it for his own use or non-use and exclude all others. But the more important and valuable the invention, the less likely it is that the patent holder will be willing to undertake commercialization alone or exclude it from the market. The patent holder can, of course, grant royalty-free licenses to all.[58] However, this requires a combination of extraordinary confidence, will power and love of never-ending striving, lack of greed, and untapped markets, which seems to be highly atypical in the industrial community. The usual patent holder wants immediate financial returns. Since price fixing and restrictive provisions in licenses are being sharply attacked, he must depend to a greater extent on royalties.

It has been repeatedly stated by the courts that "a patentee is free in establishing a royalty on a patent to fix any base that it desires. . . ." [59] For the royalty basis is said to be a matter for bargaining between the parties, who may adapt it to their own convenience in accounting and business operations. Unless qualified, however, this view is too broad, for there is a public interest involved in the fixing of royalty bases, as in all matters concerning patents.

Discrimination Among Licensees.—The patent holder's choice of a royalty plan is limited by the requirement that it must not be used to obtain a monopoly on unpatented goods. Thus the consideration exacted for the use of the patent must be equal in every respect for those who purchase unpatented material for use with the patented devise or process from the patentee and those who buy from his competitors. Recovery was denied in a suit for infringement of a patent on a process for demulsifying oil-water mixtures where plaintiff licensed purchasers from plaintiff of fifty gallon drums of an unpatented commercial product used in the process to use the process royalty free with the contents of the drum, while offering unlimited licenses to the public at a royalty of one cent for each 42-gallon barrel of oil recovered plus an annual charge of $120 per well.[60] Nor can a holder

57. VAUGHAN, ECONOMICS OF OUR PATENT SYSTEM 125-127 (1928).

58. "An insistent question is why not a return to the early ways of Henry Ford." HAMILTON, PATENTS AND FREE ENTERPRISE, 121 (TNEC Monograph 31, 1941).

59. United States v. General Electric Co., *et al.*, 82 F. Supp. 753, 876 (D.N.J., 1949).

60. Dehydrators Ltd. v. Petrolite Corp. Ltd., 117 F.2d 183 (9th Cir. 1941).

of a patent on a process for curing fresh concrete by coating it with an unpatented bituminous emulsion to prevent evaporation include all royalty charges for use of the process in the price of each gallon of unpatented emulsion purchased from it, but require users of the process who purchased emulsion elsewhere to pay royalty based on the number of square yards covered by the process.[61] The court pointed out that the latter royalty contrivance made the contractors' costs highly uncertain and unpredictable since the area that could be covered with a given amount of emulsion varied between five and eighteen square yards per gallon depending upon the temperature and the skill of the workman. Thus contractors who purchased the emulsion from the patentee would be able to spread it thinly and thus reduce royalty costs, whereas the same course was not open to those who purchased the unpatented emulsion from patentee's competitors. An even clearer case is where a royalty is based upon any figure that increases directly as the prices of the patentee's competitors in the manufacture of unpatented goods decrease. For example, a royalty based upon the difference betwen the sales price of the patentee's unpatented product for use in the patented process and the sales price of that product as sold on the open market has been held illegal as tending to make users of the process purchase the unpatented goods from the patentee.[62]

Basing Royalties on Unpatented Products.—The patentee cannot base his royalty solely upon the licensee's output of certain unpatented equipment, so as to persuade the licensee not to manufacture that particular unpatented equipment and thus increase sale of the patented product. That such a power over the production of his licensee is not within the patent holder's monopoly grant is demonstrated by Justice Reed's statement in *United States v. U.S. Gypsum:*

> "The provision in the license contracts that royalties should be paid on the production of unpatented board is strongly indicative of an agreement not to manufacture unpatented board, and the testimony of the witnesses is ample to show that there was an understanding if not a formal agreement, that only the patented board would be sold. Such an arrangement in purpose and effect increases the area of the patent monopoly and is invalid."

Royalty rates on unpatented manufactures of the licensee, graduated to increase sharply as gross sales or production output exceeded certain quotas, are also illegal. The Seventh Circuit held invalid such a license provision in which the royalty was based upon the number of unpatented bricks turned out by patented machinery because it was "obviously a price fixing, quantity production agreement." [64]

61. Barber Asphalt Corp. v. La Fera Grecco Contracting Co., 116 F.2d 211 (3d Cir. 1940).
62. Dehydrators Ltd. v. Petrolite Corp. Ltd., 117 F.2d 183, 186 (9th Cir. 1941).
63. 333 U.S. 364, 397 (1948).
64. American Equipment Co. v. Tuthill Bldg. Material Co., 69 F.2d 406, 409 (7th Cir. 1934).

It has been held, however, in a series of district court cases and in a recent Supreme Court Case that a license contract can call for royalties founded upon a specified percentage of licensee's gross sales of unpatented as well as patented products, or a percentage of the sales prices of a part of the licensee's products, regardless of whether or not the patents are utilized in the manufacture of the products. Mr. Justice Minton stated in *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*[65] that this type of royalty provision was not per se a misuse of patents and that there was no valid objection to the requirement that a minimum royalty of $10,000 a year be paid even though the licensee does not make any use of the inventions embodied in the licensor's patents. This was not considered an extension of the patent monopoly but just another way of expressing a variable consideration for use of the 700 odd patents, adopted for convenience of accounting and as harmless as would be a stipulation for a percentage of the net profits of the licensee's business. The non-exclusive license upon which the patentee sued to recover royalties allowed the defendant licensee to use any or all of some 700 patents, chiefly pertaining to radio and television, in the manufacture of radios, television sets and phonographs for "private noncommercial use." The *Gypsum* case was distinguished on the absence of any purpose or effect to control licensee's production.

Various district court cases have upheld royalties based upon licensees' output of unpatented solid carbon dioxide whether or not produced by the processes and apparatus licensed under the patents;[66] the sale of unpatented spectacle units embodying patented lenses;[67] the sale of all flat glass stenciled by the patentee's process;[68] or on the quantity of material used or work processed with the patentee's rust-proofing process.[69]

Thus, the lower federal courts and the Supreme Court up to now generally have approved the basing of royalties upon the licensee's sales as a matter solely for bargaining between the parties. However, where royalty provisions have been used to control production or prices, limitations have been placed on the licensor's freedom to choose his own royalty base.

Conclusion

Obviously, the trend of court decisions is to place greater restrictions on patentees' attempts to secure their reward. Certainly, it cannot be said that the judiciary has so acted without cause. Rather, the burden of promulgating and enforcing such restrictions was forced upon it by the unconscionable and selfish arrangements imposed by many patentees upon their licensees. Competition was supressed; price fixing not only of patented

65. Automatic Radio Mfg. Co., Inc. v. Hazeltine Research, Inc., 339 U.S. 827 (1950).

66. International Carbonic Engr. Co. v. Natural Carbonic Products, Inc., 57 F. Supp. 248 (S.D. Cal. 1944).

67. American Optical Co. v. N.J. Optical Co., 58 F. Supp. 601 (D. Mass. 1944).

68. Ceramic Process Co. v. Cincinnati Adv. Prods. Co., 28 F. Supp. 794 (S.D. Ohio 1939).

69. United States v. Parker Rust Proof Co., 61 F. Supp. 805 (E.D. Mich. 1945).

products but also of unpatented items was indulged in; and royalties which had the effect of controlling the production of many items were thrust upon manufacturers. Inevitably, serious conflicts developed between these practices and the free competition so fundamental to our economic system. Courts have generally considered the latter interests as superior, and thus today arrangements which incorporate mechanisms for price fixing, production control, or the obtaining of a monopoly on non-patented goods are severely frowned upon. Patentees are no longer able to dictate the prices of non-patented products produced by their licensees, and their right to set the price of patented products is under attack by a substantial minority of the Supreme Court, led by Justice Douglas. Consequently, it should be recognized that a three-fold risk is involved in the insertion of price-fixing provisions in patent licenses—*i.e.,* the risk of having to litigate the patent; having relief in an infringement action or other litigation denied, and of violating the anti-trust laws.

Broad royalty bases, however, are still available to the patentee, and if properly used, adequate reward may be received and satisfactory protection obtained from his licensee's competition. For example, royalties may be based on either the patented or gross sales of licensees. The base used is said to be a matter of accounting and business convenience to be bargained for by the parties. However, such agreements will be declared invalid if their purpose or effect is to monopolize or control the production of unpatented products. Thus quota restriction and discriminatory royalties have not been allowed, and it is most probable that the court's attention and severe scrutiny will be continually directed at royalty arrangements based on a licensee's total production. For this area may still provide a fertile territory for patentees to use their superior bargaining position in order to reap rewards exceeding those contemplated in the patent statutes.

The challenge therefore is clear. Patentees, if they wish to avoid being subjected to increased government restrictions, must harmonize their desires with the basic tenants of our economic system. The monopoly granted them is "to promote the progress of science and useful arts." It must not be abused.

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